

INDIANA COURT OF APPEALS
ORAL ARGUMENT AT A GLANCE
BENTON CENTRAL JR.-SR. HIGH SCHOOL



ANDRE DESHAZIER v. STATE OF INDIANA

Appeal from:
Marion Superior Court
The Honorable Steven
Rubick, Judge

Oral Argument:
Tuesday, October 30, 2007
1:00 — 1:40 p.m.
20 minutes each side

CRIMINAL LAW

Was there sufficient evidence to convict the defendant of carrying a handgun without a license?

Does the defendant's sentence exceed that allowed by statute for crimes committed in "an episode of criminal conduct?"

Was the defendant subject to double jeopardy by being convicted and sentenced to two counts of resisting law enforcement?

CASE SYNOPSIS

Facts and Procedural History

On December 31, 2005, two police officers received a dispatch regarding a complainant who had called the department to report the location of a previously stolen vehicle. When the officers arrived on the scene, they observed the caller, who directed them to a vehicle. The officers approached the vehicle and instructed its occupants to put their hands in plain view. The officers smelled marijuana, and placed the passenger in handcuffs. Andre Deshazier, who was seated in the driver's seat, did not comply with the officers' requests and repeatedly moved his hands toward the middle of his legs. After the

third time that Deshazier made such a movement, an officer grabbed Deshazier and pulled him from the vehicle. At this point, an officer observed a handgun in the vehicle, yelled "gun, gun, gun!", and dove into the vehicle to secure the weapon. Deshazier turned around and punched an officer. The officers then began struggling with Deshazier and told him that he was under arrest. During the struggle, an officer ripped off Deshazier's jacket, and Deshazier managed to escape. After Deshazier fled, the officers discovered marijuana in Deshazier's jacket and cocaine on the vehicle's driver's side floorboard. After radioing for assistance, officers eventually found Deshazier hiding underneath a bed in the rear of a residence that he had entered by kicking in a side door. Deshazier refused the officers' commands to come out from under the bed, and did not surrender until a police dog

Andre Deshazier v. State of Indiana

CASE SYNOPSIS



grabbed his arm.

The State charged Deshazier with two counts of carrying a handgun without a license, one count as a Class C felony and one count as a Class A misdemeanor; possession of cocaine, a Class C felony; two counts of resisting law enforcement, one count as a Class D felony and one count as a Class A misdemeanor; battery, a Class D felony; and possession of marijuana, a Class A misdemeanor.

The jury found Deshazier not guilty of possession of cocaine, was unable to reach a verdict on the battery charge (the State dismissed the battery count), and found Deshazier guilty of the remaining counts. Following a sentencing hearing, the trial court sentenced Deshazier to eight years with two years suspended for the handgun charge, three years for felony resisting arrest, one year for misdemeanor resisting arrest, and one year for possession of marijuana. The trial court ordered all sentences to run consecutively, except for the misdemeanor resisting arrest sentence, which it ordered to run concurrent to the felony resisting arrest sentence. Therefore, Deshazier's aggregate sentence is twelve years with two years suspended. Deshazier now appeals.

Parties' Arguments

Issue 1:

Deshazier argues that the State did not introduce sufficient evidence to prove that he carried the handgun found in the vehicle. The State argues that it introduced sufficient evidence for the trier of fact to infer constructive possession. That is, the State argues that although it had no direct evidence that

Deshazier was carrying the handgun, it had circumstantial evidence that Deshazier had knowledge of the weapon's presence in a location where he could exercise control over the weapon. Constructive possession is sufficient to support a conviction.

Issue 2:

Deshazier argues that his two convictions for resisting arrest cannot stand because of constitutional prohibitions of double jeopardy. Specifically, Deshazier argues a reasonable possibility exists that the jury used the same evidence to convict him of the two offenses. The State argues that the felony resisting arrest conviction was based on Deshazier's act of hitting Officer Ressino, and the misdemeanor conviction was based on his act of fleeing from the scene.

Issue 3:

In Indiana, except for crimes of violence, when ordering consecutive sentences, the aggregate sentence for crimes committed during a single episode of criminal conduct may not exceed the advisory sentence for the class of felony one class higher than the most serious felony of which the defendant was convicted. Here, the most serious felony of which Deshazier was convicted was a Class C felony. The advisory sentence for a Class B felony is ten years. Therefore, Deshazier argues that the trial court improperly sentenced him to a sentence exceeding ten years, and that this court should reduce his sentence.

Case Synopsis (continued)

The State initially argues that the applicable Indiana statute limiting a trial court's ability to order consecutive sentences does not apply to Deshazier's conviction for marijuana because the statute limits a trial court's ability to order consecutive sentences for felonies, and Deshazier's marijuana conviction was a misdemeanor.

The State also argues that the Deshazier's possession of the handgun and subsequent acts of resisting arrest were part of separate episodes of criminal conduct, and that therefore, consecutive sentences are permitted.

Glossary of Terms

Advisory Sentence: Under Indiana's sentencing scheme, a trial court is given a sentencing range for each crime of which a defendant is convicted. An advisory sentence is a recommended, or advised, sentence. For example, for a Class B felony, a trial court may sentence a defendant to somewhere between 6 years and 20 years, with an advisory sentence of 10 years.

Concurrent Sentences: Sentences that are served at the same time. If a defendant is convicted of two crimes and trial court sentences a defendant to two concurrent 10-year terms, the defendant will actually serve only ten years.

Consecutive Sentences: Sentences that are served one after the other. If a trial court orders a defendant to serve two consecutive ten-year terms, the defendant will serve twenty years.

Double Jeopardy: Repeated prosecution for the same offense; double jeopardy is prohibited by the 5th Amendment to the United States Constitution, and by Article I, Section 14 of the Indiana Constitution.

Episode of Criminal Conduct: Offenses or a connected series of offenses that are closely related in time, place, and circumstance.

Felony: A serious offense. Felonies are divided into four Classes, with Class D felonies being the least serious and Class A felonies being the most serious, except for murder, which is classified separately.

Misdemeanor: An offense considered less serious than a felony. The most serious misdemeanors are Class A misdemeanors, for which a trial court may sentence a defendant to up to one year in prison.

Sufficient Evidence: In order to support a conviction, the State must introduce sufficient evidence to allow a trier of fact (the judge in a bench trial or a jury in a jury trial) to conclude beyond a reasonable doubt that the defendant committed the offense. On appeal, this court does not reweigh evidence, and reviews only whether evidence exists to support the decision made by the trier of fact.

Suspended Sentence: A portion of a sentence that the defendant does not serve in prison. A trial court generally orders that a defendant be placed on probation for the suspended portion of a sentence. If a defendant violates terms of probation, the trial court may then order the defendant to serve the previously suspended portion of his sentence in prison.

Opinion in this case expected:
By end of calendar year 2007

Please check the Court's website to read the opinion.

For more information, see
<http://www.in.gov/judiciary/appeals/>

Or contact:
Indiana Court of Appeals
115 W. Washington Street
Suite 1270 South
Indianapolis,
IN 46204
(317) 234-4859
E-mail:
mpierce@courts.
state.in.us



TODAY'S PANEL OF JUDGES

Hon. James S. Kirsch (Marion County), Presiding

- Judge of the Court of Appeals since March 1994

James S. Kirsch was appointed to the Court of Appeals in March 1994 and served as Chief Judge from March 1, 2004 to February 28, 2007. A native of Indianapolis, Judge Kirsch is a graduate of the Indiana University School of Law at Indianapolis (J.D., cum laude, 1974) and Butler University (B.A. with honors, 1968).

Judge Kirsch served as Judge of the Marion Superior Court from 1988 to 1994 and as presiding judge of the court in 1992. From 1974 to 1988, he practiced law with the firm of Kroger, Gardis & Regas in Indianapolis in the areas of commercial and business litigation and served as managing partner of the firm. Since 1990, he has held an appointment as Visiting Professor of Law and Management at the Krannert Graduate School of Management at Purdue University.

Judge Kirsch is a past-president of the Indianapolis Bar Association and of the Indianapolis Bar Foundation and is a former member of the Board of Visitors of the Indiana University School of Law-Indianapolis. He

is a past-president of the United Way/Community Service Council Board of Directors and a current or former member of the Board of Directors of the United Way of Central Indiana, the Board of Associates of Rose Hulman Institute of Technology, and of the Boards of Directors of the Goodwill Industries Foundation of Central Indiana, Community Centers of Indianapolis, the Indianapolis Urban League, the Legal Aid Society of Indianapolis, and the Stanley K. Lacy Leadership Association. He is a Fellow of the Indiana State Bar Foundation and of the Indianapolis Bar Foundation.

Judge Kirsch is a frequent speaker and lecturer and has served on the faculty of more than 200 continuing legal education programs. He has been named a Sagamore of the Wabash by four different governors.

Judge Kirsch and his wife have two children. He was retained on the Court in 1996 and 2006.

The Court of Appeals hears oral argument at venues across the state to enable Hoosiers to learn about the judicial branch.

This initiative began statewide just prior to the Court's centennial in 2001.

Today's oral argument is the 195th case the Court of Appeals has heard "on the road" since early 2000.

Sites for traveling oral arguments are often law schools, colleges, high schools, and county courthouses.

TODAY'S PANEL OF JUDGES

Hon. Margret G. Robb (Tippecanoe County)

- Judge of the Court of Appeals since July 1998

Margret G. Robb was appointed to the Indiana Court of Appeals in July 1998 by Gov. Frank O'Bannon. She holds a B.S. and M.S. in Business Economics from Purdue, and is a 1978 Magna Cum Laude graduate of Indiana University School of Law - Indianapolis.

Prior to joining the Court, Judge Robb was engaged in the general practice of law for 20 years in Lafayette and was a Chapter 11, 12 and a Standing Chapter 7 Bankruptcy trustee for the Northern District of Indiana; and the Federal Advisory Committee for the expediting of Federal Litigation. She was a registered family and civil law mediator and served as a Tippecanoe County Deputy Public Defender. She chairs the Supreme Court Task Forces on Family Courts, the development of Trial Court Local Rules, and is involved in several projects to benefit the Indiana legal system. She has also served as a member of the Indiana Board of Law Examiners, the Governance Committee of the Supreme Court IOLTA (Interest On Lawyers' Trust Accounts) Committee; the Federal Advisory Committee on Local Rules for the Federal Court for the Northern District of Indiana; and Federal Advisory Committee for the expediting of Federal Litigation.

Judge Robb has held numerous Board positions for and been an officer for the Indiana State Bar Association, Indiana Bar Foundation, Tippecanoe County Bar Association, Indianapolis Bar Association, Indianapolis Bar Foundation, American Bar Foundation, National Association of Women Judges, Indiana University School of Law at Indianapolis Alumni Association, and speaks frequently on legal topics for attorneys and other judges. Judge Robb was Founding Chair of the Governor Otis Bowen's Commission on the Status of Women; was a recipient of the 1993 Indiana State Bar Association's "Celebrating 100 Years of Women in the Legal Profession" award; the 2001 Maynard K. Hine distinguished alumni award, given in recognition of support and service to IUPUI and Indiana University; the 2004 Bernadette Perham "Indiana Women of Achievement" Award, bestowed by Ball State University in honor of one of their outstanding professors; the 2005 Indiana State Bar Association's Women in the Law Recognition Award; and the 2006 Tippecanoe County YWCA Salute to Women "Women of Distinction" Award.

Judge Robb, who was re-elected on the Court of Appeals by election in 2000, is married to a professor at Purdue. Their son, a graduate of the United States Naval Academy, is on active duty in the United States Navy.

The 15 judges of the Indiana Court of Appeals issue more than 2,500 written opinions each year.

The Court of Appeals hears cases only in three-judge panels. Panels rotate three times per year. Cases are randomly assigned.



TODAY'S PANEL OF JUDGES

Hon. Michael P. Barnes (St. Joseph County)

- Judge of the Court of Appeals since May 2000



Michael P. Barnes was appointed to the Indiana Court of Appeals by Governor Frank O'Bannon on May 22, 2000. He received his B.A. from St. Ambrose College in Davenport, Iowa in 1970 and his J. D. from the University of Notre Dame Law School in 1973.

Judge Barnes was a Deputy Prosecuting Attorney and privately practiced law in South Bend from 1973 to 1978. In 1978 he was elected the St. Joseph County Prosecuting Attorney, a position he held for 20 years. During that tenure, Judge Barnes was elected President of the National District Attorneys Association (1995-1996), Chairman of the Board, Indiana Prosecuting Attorneys Council (1982-1983, 1992-1993), President of the St. Joseph County Bar Association (1992-

1993), National Board of Trial Advocacy (1995-1996), National Advisory Council on Violence Against Women (1997), Chairman of the Board of Regents, National College of District Attorneys (1997-1998), American Prosecutor's Research Institute (1997-1998), and various other professional and civic organizations.

Judge Barnes is a member of the Indiana Bar Foundation, the St. Joseph County Bar Association, and serves on the Board of Directors of the Friends of the St. Joseph County Juvenile Justice Center and the Indiana Judges Association.

Judge Barnes, who was retained on the Court of Appeals by election in 2002, is married and has two sons.

ATTORNEYS FOR THE PARTIES

For Appellant, Andre Deshazier:
Hillary Bowe Ricks
Indianapolis

Hilary Ricks is a native of Syracuse, New York. After she and her family moved to Indiana when she was five years old, she attended grade school in Indianapolis and graduated from New Palestine High School in 1980. She received her B.A. in Political Science from Indiana University-Bloomington in August 1983 and her law degree from Indiana University-Indianapolis in 1986.

During law school, Ms. Ricks worked as a Bail Commissioner in the Marion County Jail and interned with the Marion County Public Defender Agency. Her first job after law school was as a Deputy State Public Defender, from 1986 to 1992.

Ms. Ricks entered private practice in January 1993 as an Associate with the law firm of Yvonne Ferguson Watkins. She has been a “sole practioner” since leaving that position. Ms. Ricks limits her practice to criminal defense, from first arrest to direct appeal to post-conviction relief.

Ms. Ricks is married to a Sargeant on the Indianapolis Metropolitan Police Department. They have a teenage son, a four-year-old daughter, and a dog. When she allows herself time off, she enjoys traveling with her husband and family.



For Appellee, State of Indiana:
Kelly Miklos
Deputy Attorney General
Indianapolis

Kelly Miklos was born in Indianapolis and grew up in Greenwood. She attended IUPUI and graduated with a B.A. in Anthropology in 1998. In May 2001, she received her J.D. from the Indiana University School of Law - Indianapolis.

Following law school, Ms. Miklos moved to Maine, was admitted to the bar in 2001, and was employed as an Associate in a small law firm. Her areas of specialty included criminal defense, bankruptcy, personal injury, family law, and estate planning and administration.

In 2003, Ms. Miklos moved back to Indiana, was admitted to the bar in 2004, and was employed by the Office of the Indiana Attorney General as a deputy in the Appellate Division. As a Deputy Attorney General, she has represents the State of Indiana in capital and non-capital cases on direct appeal and on post-conviction in the Indiana state courts and in federal habeas corpus proceedings.

On a personal note, Ms. Miklos has two little girls and enjoys playing soccer in her free time.